IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1971

NO. 71-1391

DOYAL SMITH, WARDEN,
GEORGIA STATE PRISON,

Petitioner,

vs.

WILLIAM PAUL HIATT,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The respondent, William Paul Hiatt, respectfully prays that this court not issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered in this proceeding on

February 1, 1972.

QUESTION PRESENTED

Was the charge to the jury that alibi must be established by the defendant to the reasonable satisfaction of the jury error for the reason that it shatters the presumption of innocence, creates confusion in the minds of the jury, shifts the burden of persuasion to the defendant on the issue of his presence at the crime and requires him to establish his innocence, and is inconsistent with the principle that the State must prove defendant's guilt beyond a reasonable doubt, thereby violating the due process clause of the Fourteenth Amendment of the United States Constitution.

STATEMENT OF THE CASE

Petitioner was convicted and sentenced to four years imprisonment on August 20, 1969, in the Superior Court of Cobb County, Georgia, on a charge of robbery, Indictment No. 2496. Application for writ of habeas corpus was made to the United States District Court for the Middle District of Georgia, exhaustion of state remedies being under 28 U.S.C. Sec. 2254 because the State's highest court has consistently held the error complained of did not deny due process of law as guaranteed by the Fourteenth Amendment of the United States Constitution.

In denying the petition for habeas corpus to the United States District Court for the Middle District of Georgia, that court held, No. 2661 (M. D. Ga. July 8, 1971), that there was not gross error "of constitutional proportion" as to deny petitioner due process. The United States Court of Appeals for the Fifth Circuit reversed on February 1, 1972, on the basis of that court's decision in Smith v. Smith, 454 F. 2d 572 (5th Cir. 1971) (No. 71-1311).

ARGUMENT

1. The decision of the Court of Appeals for the Fifth Circuit is in harmony with a contemporary decision of

the Court of Appeals for the Eighth Circuit on the same constitutional law principle. In Johnson v. Bennett, 414 F. 2d 50 (8th Cir. 1969) an Iowa alibi charge was held to be violative of due process.

2. The Court of Appeals of Georgia in Parham v. State, 120 Ga. App. 773 (1969) held Georgia's statutory alibi charge unconstitutional, in light of Johnson v. Bennett, 393 U. S. 253 (1968). (Nevertheless, the Supreme Court of Georgia, Thornton v. State, 226 Ga. 837 (1970) has continued to uphold the charge.)

3. The Court of Appeals for the Northern District of Georgia,

Smith v. Smith, 321 F. Supp. 482 (1970) has held the Georgia alibi charge violative of due process in that it placed on the defendant a burden of proof as to an essential element of the crime, i.e., his presence at the scene, when the accused should have only an "opportunity to rebut" rather than a duty to present evidence.

This traditional position has been the rule in the Fifth Circuit, as proclaimed fifty years ago in Falgout v. U. S., 279 F. 513 (5th Cir. 1922).

4. Even if the Georgia alibi charge did not put on the defendant a burden of proving non-presence, it did eliminate a vital element from the

requirements which must be proved by the state, and it presented to the jury conflicting and misleading instructions and effectively eroded the constitution's protective shield of "presumption of innocence."

Contrary to the district court's view that the defendant must prove his alibi because "it is his undertaking" in asserting the alibi (R. 65), historically it has been the state, not the accused, who "must establish" his case (as charged in the written indictment).

The Georgia charge that a defendant must establish the alibi to the reasonable satisfaction of the jury conflicts with the general charge on reasonable doubt, and the jury is not

instructed which charge to follow. Stump v. Bennett, 414 F. 2d 50 (5th Cir. 1969).

CONCLUSION

The Court of Appeals for the Fifth Circuit has adhered on this issue to the decisions of the Supreme Court of the United States, the Court of Appeals for the Eighth Circuit, the District Court for the Northern District of Georgia, and to its own prior decisions. The issue is well settled, and it is respectfully requested that this court deny writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I, counsel of record for Respondent herein, have this day served true and correct copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, by mail, by depositing same in a United States mail box, with first-class postage pre-paid, addressed to the following counsel of record:

Hon. Arthur K. Bolton
Attorney General
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334

This _____ day of July, 1972.

_____
Edward T. M. Garland